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No. 76-1573

In the Supreme Court of the United States

OCTOBER TERM, 1977

JIM S. BARNETTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 546 F. 2d 187. The opinion denying rehearing (Pet. App. 9a-10a) is reported at 549 F. 2d 398.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1977. A petition for rehearing was denied on March 25, 1977. The petition for a writ of certiorari was filed on April 22, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a court order enjoining petitioner from paying less than the federal minimum wage and requiring him to reimburse his employees for prior wages

wrongfully withheld was sufficiently clear to apprise petitioner that the acceptance of partial kickbacks from those back wages would constitute disobedience of the order.

STATEMENT

Following a jury-waived trial in the United States District Court for the Middle District of Alabama, petitioner was found in civil contempt and convicted of criminal contempt under 18 U.S.C. 401. In the civil contempt case petitioner was ordered to turn over to the Secretary of Labor all back wages that he had paid pursuant to a court order and that had been returned to him by his employees. In the criminal contempt case petitioner was sentenced to 30 days' imprisonment and fined $1,000. The court of appeals affirmed the convictions, with one judge dissenting, but vacated the criminal contempt sentence and remanded for resentencing on the ground that 18 U.S.C. 401 does not permit the imposition of both a fine and imprisonment (Pet. App. 1a-8a).

The evidence, the sufficiency of which petitioner does not dispute, is set forth in the opinion of the court of appeals (Pet. App. 2a-6a). It showed that petitioner and Troy Motors, Inc., a corporation with which petitioner was associated, had previously been enjoined "from withholding payment of minimum wages and overtime compensation due their employees" (Pet. App. 28a) by the terms of a consent decree entered in a suit charging violations of the minimum wage and overtime-compensation provisions of the Fair Labor Standards Act, 52 Stat. 1060, as amended 29 U.S.C. 201, *et seq.* Petitioner and Troy Motors, Inc., were ordered to pay back wages of $7,759.54, of which $1,783.72 was awarded to employees Gaylord, Head, Corley, Golden, and Crews.

Each of the above employees thereafter was approached by either the company's lawyer or one of its supervising employees to discuss whether he or she would consider returning part of the back wages that had been paid. Eventually, each employee returned approximately two-thirds of the amount of the court-ordered back wages he had received. The court of appeals found it "perfectly clear that an agreement of some sort was entered into with respect to the percentage of the salary payments that were to be repaid to Barnette" and accepted the determination of the district court that "such agreement was one which the employees could not safely decline to accept when hammered out in the service manager's office in the presence of Barnette" (Pet. App. 6a-7a).

The court also noted (Pet. App. 6a-7a) "undisputed evidence that [petitioner] had caused the books of the company to contain false entries * * * had instructed the employees to give a false report if questioned about the charges which were made against them in order to obtain his full two-thirds * * * [and] had directed that false records be maintained for the purpose of covering up the receipt by him of the amounts that were not paid to him in cash."

ARGUMENT

Petitioner contends (Pet. 11-14) that the order of the district court (Pet. App. 13a-17a) requiring the return of back wages was not sufficiently precise for him to understand that the receipt of partial kickbacks of these back wages was prohibited. The claim is without merit. The district court order explicitly restrained petitioner from "withholding payment of minimum wages and overtime compensation due * * * employees for the periods since June 17, 1971, in the total amount of $7,759.54" and ordered that any back pay not distributed to the underpaid employees "because of such persons' refusal to accept

such sum, shall be deposited * * * with the * * * Treasurer of the United States * * *" (Pet. App. 15a). By its terms, therefore, the order put petitioner on notice that the funds were to be expended for the employees' benefit, or else paid to the United States, not returned to the Company by means of an agreement with the same employees that it had underpaid.

Moreover, in determining whether a defendant knew or should have known that his conduct was wrongful under the terms of a court order, not only the language but the entire background of the order should be considered. *Terminal Railroad Association of St. Louis* v. *United States*, 266 U.S. 17, 29; *United States* v. *Greyhound Corp.*, 508 F. 2d 529, 532 (C.A. 7); *United States* v. *Christie Industries Inc.*, 465 F. 2d 1002, 1007 (C.A. 3). Here, the acceptance of kickbacks from sums that petitioner was required to pay his employees plainly defeated the purpose of the order, which was to require that petitioner or the Company reimburse its employees for wages unlawfully withheld.[1] Indeed, the fact that petitioner sought to conceal the kickbacks reflects his understanding that such conduct was impermissible. In view of the language of the court's order, the context in which it was issued, and the purpose that it was intended to serve, a person of ordinary intelligence would have adequate notice that acceptance of kickbacks of the wages paid to reimburse the employees would violate the order. See *Buckley* v.

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[1]One district court has noted in rejecting a similar claim:

> The clear purpose of the aforesaid Act would be thwarted and subverted were this contention upheld. The relations of employer and employee are such that the latter could easily be misled through fear or influence to the total loss of his rights under the Act. It is wholly inconsistent with the end sought to be accomplished.

United States v. *Johnson*, 52 F. Supp. 382, 383 (W.D. N.Y.).

Valeo, 424 U.S. 1, 77; *United States* v. *Harriss*, 347 U.S. 612, 617.

The decision in *International Longshoremen's Association, Local 1291* v. *Marine Trade Association*, 389 U.S. 64, upon which petitioner relies (Pet. 8, 11, 13), is inapposite. In that case a union was required by court order to comply with a labor arbitration award stating that an employer's interpretation of an hours-of-work provision in a collective bargaining agreement was "correct." Although counsel for the union noted that the award contained only an abstract proposition and no command capable of enforcement, the district court declined to clarify its order. This Court reversed a citation against the union for civil contempt after further disputes resulted in strikes, holding that the district court's order violated the requirements of Rule 65(d), Fed. R. Civ. P., because it failed to state in specific terms the act that it commanded or prohibited. Here, by contrast, the district court's order specifically indicated the act that it was forbidding petitioner's retention of compensation owed to his employees.[2]

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[2]This case is also unlike *In Re Joyce*, 506 F. 2d 373 (C.A. 5), which petitioner cites (Pet. 13). There, the Fifth Circuit held that a district court order merely "requesting" a telephone company to install a pen register would not support a citation for contempt because the order was not mandatory and accordingly failed to put the defendant "on notice that his freedom was in jeopardy if he failed to comply with the order."

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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